which appeared to have been done contemporaneously with the preparation of the document in question. The plaintiff had alleged that the defendant was negligent in preparing it. On that basis, it could be said that there was a distinct disadvantage suffered by the plaintiff as a result of the alleged negligent act of the defendant from the moment of execution of the said Sale and Purchase Agreement on 24 June 1985. It should be noted that the plaintiff had claimed losses amounting to (a) RM140,000 being the purchase price of the property he had lost and (b) RM40,000 agreed liquidated damages. In the circumstances, the plaintiff's right to sue accrued on 24 June 1985. Since the plaintiff took out the writ on 18 September 1991, he had therefore exceeded the 6 years limit. He had brought this action more than 6 years after the accrual of his right to sue and therefore he would be barred by virtue of s. 3 and paragraph 97 of Part IV of the Schedule to the Limitation Ordinance (Cap. 49).

For the reasons given, I will allow the appeal and strike out the amended statement of claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court. Cost to the defendant to be taxed.

PUBLIC PROSECUTOR

v.

MOGAN A/L MARUTHAMUTHU

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B.
HJ. ISHAK JC
[PERAK CRIMINAL TRIAL
NO. 58-3-92 (88)
5 DECEMBER 1992

DANGEROUS DRUGS: Trafficking in dangerous drugs - Cannabis - Presumption - Section 37(da)(vi) Dangerous Drugs Act 1952 - Definition of cannabis - Agent provocateur - Whether same as accomplice - Agents for prosecution - Section 40A Dangerous Drugs Act 1952 - Whether evidence of agent provocateur needs corroboration - Defence was a bare denial - Whether sufficient to rebut presumption - Discrepancies and inconsistencies in some prosecution witnesses - Whether sufficient to reject the whole of the evidence.

CRIMINAL PROCEDURE: Application by defence Counsel to recall prosecution witness at close of defence case - Section 425 Criminal Procedure Code - Discretion of Court - Whether new evidence essential to just decision of case - Prosecution witness not cross-examined on allegation of assault and coercion to admit ownership of incriminating exhibits - Effect of failure to cross-examine - Demeanour of Accused - Section 271 Criminal Procedure Code - Remarks as to demeanour of witness.

The Accused was charged for an offence of trafficking in dangerous drgus, to wit, cannabis weighing 729.51 grammes on 20 July 1988 at about 11.20 a.m. in the vicinity of Jalan Ulu Tupai, Taiping, Perak, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act. At the end of the defence case, the Accused was found guilty, convicted and sentenced to death for the offence for which he was charged.

Held:

[1] Generally, the Court is always wary of the evidence of an agent provocateur. But, in this case, by virtue of s. 40A of the Dangerous Drugs Act 1952, the evidence of an agent provocateur needs no corroboration to make a finding by the trial Court.

[2] Having seen and heard the Accused and considered his defence as a whole, the Accused's version cannot be believed and it was merely a denial.

[3] The Accused has failed to rebut the presumptions under s. 37(d) and (da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities.

[4] The prosecution had proved its case beyond reasonable doubt and the Accused was found guilty of the offence for which he was charged, convicted and sentenced to death.

[Accused found guilty, convicted and sentenced to death].

Cases referred to:
Haw Tua Tau v. PP [1981] 2 MLJ 49 / [1981] 1 CLJ 123 ***(refd)***
Ragunathan v. PP [1982] 1 MLJ 139 / [1982] 1 CLJ 25 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 / [1987] 1 CLJ 250 ***(foll)***
PP v. Aziz bin Salleh [1991] 1 CLJ 85 ***(cit)***
R v. Frost [1939] 9 C and P 129 ***(foll)***
Loke Poh Siang v. Public Prosecutor [1957] MLJ 107 ***(refd)***
PP v. Boo Chew Hia [1963] MLJ 33 ***(refd)***
PP v. Abdul Hamid [1969] 1 MLJ 53 ***(refd)***
Ramli bin Kechik v. Public Prosecutor [1986] 2 MLJ 33 / [1986] 1 CLJ 308 ***(refd)***
PP v. Phon Nam [1988] 3 MLJ 415 / [1989] 1 CLJ 7 ***(refd)***
R v. Bakar bin Sahat [1951] MLJ 202 ***(refd)***
Jacob v. Public Prosecutor [1949] MLJ 70 ***(refd)***
Loh Keck Leong v. Public Prosecutor [1992] 2 MLJ 177 SC / [1992] 3 CLJ 1332 ***(foll)***
Khoon Chye Hin v. PP [1961] 1 MLJ 105 ***(refd)***
Sathasivam & Ors. v. PP [1949] MLJ 71 ***(refd)***
PP v. Mohamed Halipah [1982] 1 MLJ 155 / [1981] 1 CLJ 92 ***(refd)***
PP v. Tahir bin Kassim [1985] 1 MLJ 381 ***(refd)***
Namasiyiam & Ors. v. PP [1987] 2 MLJ 336 SC / [1987] 1 CLJ 540 ***(refd)***
PP v. Tan Gong Wai and Anor. [1985] 1 MLJ 355 ***(refd)***
PP v. Teo Boon Qeer & Anor. [1984] 1 CLJ 123 ***(refd)***
R v. Vilayutham [1935] MLJ 277 ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
R v. Pichimuthu [1970] 2 MLJ 143 ***(refd)***
Wong Swee Chin v. Public Prosecutor [1981] 1 MLJ 212 ***(refd)***
PP v. Ku Lip See [1981] 1 MLJ 258 ***(refd)***
D.A. Duncan v. PP [1980] 2 MLJ 195 FC ***(refd)***
PP v. Ling Tee Huah [1982] 2 MLJ 324 ***(refd)***
PP v. Akin Khan bin Abdul Rahman [1987] 2 CLJ 244 ***(refd)***
Kevin John Barlow and Brian Geoffrey Chambers v. PP [1987] 2 CLJ 286 SC ***(refd)***
Broadhurst v. The Queen [1964] AC 445 ***(refd)***
PP v. Lam San [1991] 3 MLJ 426 SC / [1991] 3 CLJ 2410 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(1)(i), 271, 425
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(vi), 39A(2)(f), 39B(1)(a), 39B(2), 40A
Evidence Act 1950, s. 138

Other sources referred to:
Sarkar on Evidence, Vol. 6 Edn. 1990, pp. 698 and 699

For the Public Prosecutor - Sapini Mat Saman, DPP
For the Accused - A. Xavier

JUDGMENT

Hj. Abdul Malik b. Hj. Ishak JC:

The Accused was charged with trafficking in dangerous drugs, to wit, cannabis weighing 729.51 grammes at about 11.20 a.m. on 20 July 1988, in the vicinity of Jalan Ulu Tupai, Taiping Perak, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

The facts of the case as adduced by the prosecution are as follows: Sometime in May 1988, ASP Raja Zamani bin Raja Abdullah (PW8) attached to the Anti Narcotics Division, Police Contingent Headquarters, Ipoh Perak launched a project to weed out drug traffickers in the state of Perak. With this in mind, he deployed viz, DPC Mohd. Rais bin Ibrahim (PW2) and DPC Shafie bin Mat (PW3) to Taiping Perak to investigate a male Indian known as Mogan, believed to be involved in drug trafficking, in and around the vicinity of Pokok Assam, Taiping, Perak. As undercover agents, both PW2 and PW3 proceeded, incognito, to Taiping, Perak.

PW2 managed to establish contact with the male Indian by the name of Mogan who was at the material time staying at Kampong Aman, Pokok Assam, Taiping Perak. Both PW2 and PW3 visited Mogan at his house. A close rapport was somehow developed amongst them.

In the course of the trial the male Indian by the name of Mogan was identified by PW2, PW3, PW6 (Inspector Syed Talib bin Syed Abu Bakar), PW7 (Acting ASP Ahmad bin Megat Hussain) and PW8 as the Accused.

Both PW2 and PW3 kept in touch with PW8 from time to time in regard to the progress of their work in Taiping, Perak. Each time they contacted the Accused, they would relay and report to PW8 accordingly.

On 16 July 1988, both PW2 and PW3 visited the Accused at his house. There the Accused promised to supply ganja (cannabis) to PW2 on 20 July 1988. With the blessing of PW8, both PW2 and PW3 paid the Accused a visit in his house on the scheduled date (20 July 1988). This time, the Accused showed and gave 50 rolls of cannabis to PW2. From there the Accused brought PW2 and PW3 to an area known as Ulu Tupai where the drugs meant to be sold to PW2 were kept. All three proceeded by car to Ulu Tupai. That car (bearing false registration number WC 850) was driven by PW3, with PW2 seated in the front passenger's seat while the Accused sat at the rear. Once inside the car PW2 put the 50 rolls of cannabis given to him earlier by the Accused inside the glove compartment.

It was in evidence that the Accused directed the way to Ulu Tupai.

Upon arrival at the vicinity of Jalan Ulu Tupai, both the Accused and PW2 alighted from the car. PW3 who kept the engine of the car idle, got out and waited.

The Accused took PW2 to an area near a cowshed where there were mangrove swamps. This was witnessed by PW3. At the edge of the mangrove swamp (at a point marked 'X' by PW2 in photograph P12E) near to a wooden gate, PW2 stopped. The Accused proceeded ahead and entered the mangrove swamp. A short while later (a brief 5 minutes according to PW3), the Accused came out of the mangrove swamp and **was seen carrying a bag** (exhibit P3) **with his right hand**. In the presence of PW2, the Accused unzipped the bag (exhibit P3) revealing a red plastic bag (exhibit P4). The Accused forthwith tore the red plastic bag (exhibit P4) and showed to PW2 rolls of ganja (cannabis). After PW2 had ascertained that it was in fact ganja (cannabis), the Accused zipped-up the bag (exhibit P3), **carried it and brought it to the waiting car**. Again, all this was witnessed by PW3.

Still carrying the bag (exhibit P3), the Accused entered the rear portion of the car. PW2 followed suit. At that time PW3 was standing outside the car near to the driver's side. Immediately thereafter PW2 introduced his office to the Accused by saying: "Police" and duly placed the Accused under arrest (by wrangling the neck of the Accused with his right hand). PW3 handcuffed the Accused. PW2 then seized the bag (exhibit P3) which was located on the floorboard of the rear portion of the car near the legs of the Accused. According to PW2 the Accused appeared shocked and became panicky when he heard the words "Police". While PW3 stated that the Accused reacted in disbelief that they were police personnel and that the Accused was in total shock.

From there PW3 drove the car straight to Pokok Assam police station. Upon arrival, the Accused was escorted by PW3 to the information room of the said police station, while PW2 carried the bag (exhibit P3) with its contents. According to PW2, on alighting from the car, the 50 rolls of cannabis was retrieved by him from the glove compartment and placed inside the bag (exhibit P3).

Evidence was also led that PW2 examined and marked the bag (exhibit P3) and its contents in the presence of the Accused, PW8, PW3 and three other police personnel in the information room of Pokok Assam police station. As a result of that examination, a total of 1,988 rolls suspected to be cannabis was found. The incriminating exhibits were duly identified. PW7 too marked the bag (exhibit P3) and the incriminating exhibits at a later stage.

A search list (exhibit P13) was also issued to the Accused. Later, on the same day at about 6.00 p.m. PW2 lodged a police report vide Taiping report number 6041/88.

The prosecution adduced sufficient evidence to establish that there was no break in the chain of evidence relating to the exhibits until they reached this Court.

In due course the chemist (PW1) analysed the incriminating exhibits and found that it contained 729.51 grammes of cannabis, the subject matter of the charge. Suffice it to say that the defence, at this stage, did not challenge the findings of the chemist. I shall revert to this piece of evidence at a later stage.

At the close of the case for the prosecution, the learned defence Counsel elected not to submit on the issue of no case to answer. Nevertheless upon a careful scrutiny of the evidence adduced by the prosecution, I was satisfied that the prosecution had in fact raised the presumptions under s. 37(d) and (da)(vi) of the Dangerous Drugs Act 1952 and thus the prosecution had made out a *prima facie* case which if

unrebutted would warrant the conviction of the Accused. In this connection it is to be noted that at the close of the case for the prosecution I am only bound to consider whether the prosecution had by their evidence established directly or by reasonable inference every ingredient pertaining to the offence with which the Accused is charged - see *Haw Tua Tau v. PP* [1981] 2 MLJ 49 and *Ragunathan v. PP* [1982] 1 MLJ 139. In this aspect of the law, I need only cite the following guideline adopted by our Supreme Court in the case of *Munusamy v. PP* [1987] 1 MLJ 492 where it was said:

> On the contrary, in overruling the various passages in Ong Kiang Kek on the effect of s. 188(1) (formerly s. 177C) it re-establishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the Accused at the close of case for the prosecution. There is accordingly no rejection of the "established beyond reasonable doubt" test, provided it is applied at that stage of the trial in the hypothetical form. Thus, under s. 180, the judge must ask himself on the basis of credible evidence, a mere hypothetical question: "If I were to accept the prosecution's evidence as accurate, would it establish the case against the Accused beyond a reasonable doubt?". Putting it in the "prima facie case" form: "On the assumption that the prosecution's evidence was accurate could the Accused be lawfully convicted?". If the answer to either question is in the affirmative, then a case is said to have been made which, if unrebutted, would warrant a conviction, and in such a case the Accused should be called upon to state his defence.

I must stress that I did not then proceed to evaluate the credibility or reliability or the accuracy of the recollection of the witnesses for the prosecution, in particular PW2 and PW3, but instead, left suspended these questions until after the conclusion of the case for the defence and after hearing final addresses. I therefore called upon the Accused to enter on his defence. The three alternatives were read out and explained to the Accused and he chose to give evidence on oath.

Before evaluating the evidence of the defence I must also mention that at the close of the case for the prosecution, the learned defence Counsel made an unprecedented application to use PW7 as a defence witness in the event the Accused was called upon to make his defence. The learned Deputy Public Prosecutor objected to the application.

The learned defence Counsel relied upon s. 173(1)(1) of the Criminal Procedure Code and cited Sarkar on Evidence, Vol. 6 Edn., 1990 at pp. 698 and 699 together with s. 138 of the Evidence Act and urged the court to allow the defence's application. According to the learned defence Counsel PW7 would be able to adduce certain evidence believed important for the defence case. On the other hand, the learned Deputy Public Prosecutor strenuously objected to the application and cited s. 425 of the Criminal Procedure Code and the case of *PP v. Aziz bin Salleh* [1991] 1 CLJ 85.

I disallowed the defence application for the following reasons:

(1) Ample opportunity was accorded to the defence to cross examine and put the defence story to PW7 when he was in the witness box during the course of the prosecution's case;

(2) ASP Ahmad bin Megat Hussain, the Investigating Officer of the case wore the badge of a prosecution witness throughout the trial. That badge bearing label PW7 can never be altered throughout the trial; and

(3) PW7 was not a witness offered by the prosecution to the defence at the close of the prosecution's case.

In his defence the Accused described in great detail the meetings that took place between himself and prosecution witnesses (PW2 and PW3).

According to the Accused he was introduced to PW2 by his good friend, one Mani. Through PW2, Accused was in turn introduced to PW3. The Accused stated that he could not trace Mani, a contract labourer, since he (Accused) has been detained for the last four years.

There were six meetings between the Accused and PW2 and PW3 before 20 July 1988. The first meeting was between the Accused and PW2 through Mani as an intermediary. The second meeting was the introduction of PW3 to the Accused by PW2. The third and fifth meetings were between PW2 and the Accused. The fourth and sixth meetings were between the Accused and both PW2 and PW3.

In all the six meetings, the discussion centred on the supply of ganja (cannabis) by the Accused to PW2. Hereinafter any reference to ganja would mean cannabis.

At the first meeting, PW2 enquired of the Accused as to whether he could supply ganja. PW2 wanted to purchase the ganja. The Accused told PW2 that he did not deal in ganja (cannabis) but merely smoked it. And that the Accused purchased two or three rolls for consumption. The Accused stated that he could not obtain huge supply for sale. Thereafter, according to the Accused the three of them (PW2, Mani and the Accused) then smoked ganja.

In the second meeting, PW2 enquired as to the ready supply of ganja from the Accused. The Accused answered in the negative. Again according to the Accused all three of them (PW2, PW3 and the Accused) then proceeded to smoke ganja. The episode of smoking ganja was entirely at the behest of the Accused.

At the third meeting, PW2 came alone. When the Accused gave a negative reply to a question by PW2 in regard to the supply of ganja, PW2 blew his top. PW2 admonished the Accused and in the same breath requested the Accused for help in order to obtain the supply of ganja for his (PW2's) clients. At this meeting there was no smoking session.

At the fourth meeting,, both PW2 and PW3 visited the Accused at his house. To avoid any hassle, the Accused told both of them that he had with him only 1 roll of ganja. Both PW2 and PW3 agreed with the suggestion of the Accused to smoke the said ganja. At this meeting, according to the Accused both PW2 and PW3 appeared angry but they did not utter a single word. The puffing session took place in the vicinity of Kampong Aman. From there the parties proceeded to a coffee shop for a treat by PW2. In the coffee shop, PW2 told the Accused of his plan to embark on a big business project like the Chinese provided the Accused could obtain large supplies of ganja.

In the fifth meeting, PW2 came alone. As usual PW2 enquired as to the supply of ganja. On receiving a negative reply, PW2 scolded the Accused and took offence that each time the Accused gave a negative reply. To this, the Accused stated that he was not a drug businessman but merely purchased small portions for self-consumption. Nevertheless, the Accused once again promised that he would try to procure drugs for PW2. Puffing session took place soon thereafter.

The sixth meeting was the meeting on 16 July 1988. An unforgettable date, according to the Accused. On that day both PW2 and PW3 visited the Accused, and on that day also the Accused requested both of them to return on 20 July 1988. At this sixth meeting, PW2 enquired in regard to the supply of ganja. The Accused told them that the supply of ganja would be forthcoming on 20 July 1988. The three of them then proceeded to smoke ganja at Kampong Aman using the supply brought by PW3.

On the night of 19 July 1988, the Accused saw both PW2 and PW3 in the vicinity of Kampong Aman. This was at about 8.00 p.m. They were in a car and at that material time the Accused was seated in a shop. According to the Accused each time they came they would travel in the same car. The Accused was not particularly sure about the make of the car nor its registration number. But the car was red in colour.

According to the Accused both PW2 and PW3 saw him but they did not stop and simply ignored him. The Accused was indeed surprised for at one time PW2 told him that he came from far and at that time he thought that they were not familiar with the area. The Accused reiterated that it was PW2 who told him that they were not familiar with the area, that they were from a different place. Their presence on 19 July 1988 at 8.00 p.m. in the vicinity of Kampong Aman aroused the suspicion of the Accused. The Accused felt how could they (PW2 and PW3) travel in the car if they were unfamiliar with the area.

At that time the Accused suspected that they might trap him. The Accused also felt that they came not for the purpose of buying ganja.

On 18 July 1988 the Accused admitted buying 550 rolls of ganja from his friend. The purpose of the said purchase was to give it to PW2 so that he (PW2) would not disturb him anymore. According to the Accused he kept the said ganja at the same place in Kampong Aman where they used to smoke ganja.

On being shown the photographs (P12A-E) the Accused stated that he did not know the places shown therein.

The Accused was categorical in saying that each time they smoked ganja it was at Kampong Aman. The Accused also denied that he was arrested at the place where he smoked ganja.

Having seen PW2 and PW3 in suspicious circumstances on the night of 19 July 1988, the Accused felt suspicious and proceeded to the place where he kept the 550 rolls of ganja. The purpose was to collect 50 rolls to be given to PW2. At that time the Accused was contemplating to return the remaining 500 rolls of ganja to the person who had sold it to him earlier.

The Accused also stated that he did not make any payment for the purchase of the 550 rolls of ganja. And that payment would be made later. Thus because of his suspicion the Accused decided to give them (PW2 and PW3) only 50 rolls of ganja and the balance to be returned to the seller.

On 20 July 1988 at 10.00 a.m. or 10.30 a.m. both PW2 and PW3 came to the Accused's house. Once they came, the Accused handed the 50 rolls of ganja to PW2 and told PW2 that that was what he could find. PW2 appeared dejected but nevertheless he invited the Accused for a puffing session using the 50 rolls of ganja.

PW2 then took the Accused by car to a different place. It was not a red car but a yellow car. All three (Accused, PW2 and PW3) entered the yellow car and proceeded to a place to smoke ganja. The Accused did not know where they were bringing him.

The Accused denied that he led PW2 and PW3 on 20 July 1988 to that place.

The Accused stated that they brought him to Jalan Ulu Tupai and they stopped near a cowshed. PW2 then told the Accused that that place was quiet and PW2 stated: "We can smoke ganja here".

After that PW2 and the Accused alighted from the car and walked towards the mangrove swamp. PW3 told him that he would park the car and would join them soon thereafter.

Once they entered the mangrove swamp both PW2 and the Accused sat on the ground intending to smoke ganja. The Accused stated that at the same time he saw PW2 take out a bag from a position nearer to PW2. At that time, the Accused merely saw the sling (holder) of the bag but not the bag itself. The Accused did not see the whole bag.

According to the Accused, PW2 took the said bag, unzipped it, looked inside and then closed it back by zipping it. The Accused did not see the inside of the bag.

Having closed the bag PW2 then held the shoulders of the Accused with his hands and stated: "Let's go back to the car".

Before they proceeded back to the car, the Accused invited PW2 to smoke ganja. At that time PW2 was holding onto the 50 rolls of ganja which the Accused had earlier given to him. PW2 retorted 'Never mind" and thereafter they walked out of the place. It was PW2 that carried the bag when they walked out of the mangrove swamps towards the car.

The Accused stated that once they reached the car, the Accused sat at the rear portion of the car. At the same time PW2 who was carrying the bag, placed the bag on the floorboard of the car near to the Accused's leg. PW3 then blocked the rear back portion of the car door from outside. PW2 also entered the car and said: "Saya polis" and then placed the Accused under arrest. The Accused admitted that at that time he felt giddy and was shocked after witnessing what they had done to him. Accused stated that he did not try to run away, he was still dazed.

From there, according to the Accused, he was brought to Pokok Assam police station, where upon arrival, as he got out of the car, he was pulled by one police officer by the name of DPC Manoharan.

The Accused was then placed inside a room where there were quite a number of people. There he was assaulted and placed in the lockup till 2.00 p.m. of the same day.

According to the Accused while he was in the lockup, PW2, PW3 and DPC Manoharan told him to admit ownership of the items in the bag. They told him (Accused) that the contents of the bag were ganja. They showed the ganja to the Accused. The Accused denied ownership of the ganja.

PW2, PW3 and DPC Manoharan wanted the Accused to admit that the bag and its contents belonged to him (Accused). The Accused did not admit ownership of the bag and its contents. They assaulted the Accused, they asked the Accused to admit. The Accused refused to admit. The Accused was assaulted again. The

Accused was placed in the lockup for 2 hours and during that time they assaulted him. Again the Accused stated that he did not admit ownership of the bag (exhibit P3) and its contents.

The Accused stated that while under interrogation he admitted to them (PW2, PW3 and DPC Manoharan) that he (Accused) carried 50 rolls only. The Accused admitted ownership of the 50 rolls only. The Accused could not withstand being beaten by the three of them.

The Accused further stated that he admitted that he kept 500 rolls of ganja at a mangrove swamp near Kampong Aman. Due to the massive assault levied on him by the three police personnel, the Accused admitted ownership of the 500 rolls of ganja. Thereafter the Accused brought PW7, PW6 and PW4 to the place where he (Accused) kept the 500 rolls of ganja. That place was at Kampong Aman - where they took out the 500 rolls of ganja. Photographs were also taken at Kampong Aman.

According to the Accused, from there (Kampong Aman) they proceeded to Ulu Tupai, the place where he was arrested. They also took photographs at Ulu Tupai. The Accused was later brought back to Pokok Assam police station. This time the Accused was no longer assaulted.

At about 6.00 p.m. the Accused was then taken out of Pokok Assam police station and brought to Taiping police station and placed in an office. The Accused was not placed in a lockup at Taiping police station. But the Accused stated that he was placed in the lockup while detained at Pokok Assam police station.

The Accused denied witnessing the examination of the exhibits at the information room of Pokok Assam police station.

According to the Accused in regard to the 500 rolls of ganja which he kept at Kampong Aman and which he admitted being in possession of, he was duly charged under s. 39A of the Dangerous Drugs Act 1952. The Accused pleaded guilty to the charge and was sentenced to 6 years imprisonment and 10 strokes of the rattan. The Accused has since served the sentence and has also received the 10 strokes of the rattan.

According to the Accused in the instant case the ganja did not belong to him. The Accused did not know how the ganja came to be at Ulu Tupai.

Under cross-examination the Accused disagreed that he brought PW2 and PW3 to Ulu Tupai as shown in photographs P12A-E in order to hand to them the supplies of ganja which he (Accused) kept at that place. The Accused also disagreed to a suggestion by the learned Deputy that on 20 July 1988 the Accused took PW2 and PW3 to Ulu Tupai to show them the place where he kept the ganja and also to sell the drugs to them.

The Accused denied that upon arrival at Ulu Tupai and having alighted from the car with PW2, it was the Accused that entered the mangrove swamp alone. The Accused further denied that he carried a bag after he came out of the mangrove swamp, and also denied that he showed the contents of the bag to PW2 who was waiting outside the mangrove swamp.

The Accused stated that he met both PW2 and PW3 on 20 July 1988 in order to sever relationships with both of them. This meeting with PW2 and PW3 took place on 20 July 1988 notwithstanding the fact that the Accused saw both of them (PW2 and PW3) the previous night on 19 July 1988 in the vicinity of Kampong Aman wherein the Accused suspected that they (PW2 and PW3) wanted to trap him.

When confronted by the learned Deputy as to why he gave 50 rolls of ganja to PW2 despite the fact that he (Accused) wanted to sever relationships with PW2 and PW3 the Accused expediently replied that this was done to ward off any disturbances from them.

The Accused denied that he created the story of seeing PW2 and PW3 on the night of 19 July 1988. Accused denied that because he did not see PW2 and PW3 on the night of 19 July 1988 that was why there was a meeting on 20 July 1988 between them. Accused was still stubborn and stated that he did infact see PW2 and PW3 on the night of 19 July 1988.

When shown the bag (exhibit P3), the Accused stated that he first saw the bag on 20 July 1988 when it was carried by PW2. The Accused denied the suggestions by the learned Deputy that he carried the bag, opened the bag and tore a pink plastic bag (exhibit P4), inside the pink plastic bag there was a piece of newspaper (exhibit P5) containing the rolls of ganja which the Accused showed to PW2.

The Accused again denied showing the contents of the bag to PW2 and denied carrying the bag with its incriminating contents inside the car where PW3 was waiting.

The Accused denied entering the rear portion of the car carrying the bag and its contents and then placing the bag on the floorboard near to his legs.

The Accused stated that when he entered the car at the rear portion, PW2 carried the bag and put it on the floorboard near to the Accused's leg. At that time PW3 who was standing outside the car, pushed the rear portion of the door from outside. At the same time PW2 entered the car and told the Accused: "Saya polis" and he then proceeded to arrest the Accused.

The Accused stated that he was surprised, in a daze and totally confused when he heard the word: "Police". The Accused denied that he least expected PW2 and PW3 to be police personnel and that was the reason for the surprise.

The Accused agreed that after his arrest he was taken to Pokok Assam police station but disagreed that he was placed in the information room. He stated that he was placed in the lockup.

The Accused denied that inside the information room of Pokok Assam police station there were several police personnel including PW2 and PW3 wherein the contents of the bag were opened and examined infront of the Accused. The Accused also denied that PW2 marked all the exhibits.

When asked about the alleged assault by PW2, PW3 and DPC Manoharan at the lockup and the failure of the defence Counsel to cross examine PW2 and PW3 on this point, there was a short pause and the Accused replied that he had told his defence Counsel about this.

The Accused denied that he kept 500 rolls of ganja in the vicinity of Ulu Tupai.

The Accused stated under cross-examination in regard to the 500 rolls of ganja that he had been sentenced and convicted to a term of 6 years imprisonment and ordered to undergo ten strokes of the rattan. The learned Deputy put to the Accused that in regard to the 500 rolls of ganja wherein he was convicted and sentenced as aforesaid it was infact in relation to 400 rolls of ganja and that it was the Accused that took Inspector Fadzil to a spot at Ulu Tupai area wherein the Accused showed Inspector Fadzil the 400 rolls of ganja that was buried by him (Accused) according to case number TSA 73-26/88. In reply the Accused admitted that he took Inspector Fadzil in regard to case TSA. 73-26/88 to Kampong Aman and not to Ulu Tupai area.

The learned Deputy also put to the Accused that case TSA 73-26/88 was entirely different from the instant case. When confronted further by the learned Deputy that the Accused had admitted to the facts in case number TSA 73-26/88, the Accused merely replied that he was arrested at Kampong Aman area.

The Accused admitted under cross-examination that on 26 July 1989 he was produced before the Sessions Court Taiping in case number TSA 73-26/88 and he had pleaded guilty to a charge under s. 39A(2)(f) of the Dangerous Drugs Act 1952. The Accused also admitted that the facts of the case in case number TSA 73-26/88 were read to him on 26 July 1989 at the Sessions Court Taiping.

The Accused disagreed that the facts in case number TSA 73-26/88 were in regard to the Accused bringing Inspector Fadzil to a mangrove swamp at Ulu Tupai where the Accused showed the location of the ganja that was buried therein.

On being questioned further that Inspector Fadzil, the complainant in case number TSA 73-26/88, dug and found 400 rolls of dried leaves in 8 bundles the Accused replied that he had brought ASP Ahmad Megat and two other police personnel to a mangrove swamp at Kampong Aman and had shown to them where he had hidden the 500 rolls in case number TSA 73-26/88. The Accused then stated he disagreed with the facts in case number TSA 73-26/88. The Accused even stated that he did not agree to the facts adduced in case number TSA 73-26/88.

The Accused was reminded that he had admitted to the exhibits in case number TSA 73-26/88, viz, one plastic container, 400 rolls of ganja and one paper wrapper. In reply the Accused stated that at the Sessions Court Taiping he admitted to 500 rolls of ganja and not 400 rolls.

The learned Deputy then tendered and marked the records of case number TSA 73-26/88 as exhibit (P16).

The records as per exhibit P16 were read to the Accused and when questioned by the learned Deputy that the Accused had lied while giving evidence in relation to case number TSA 73-26/88, the Accused disagreed and stated that he was telling the truth.

The Accused once again denied owning the bag (P3) and its contents. The Accused also denied that he had kept the bag (P3) and its contents at Ulu Tupai area. The Accused also denied that at the time of the arrest he was the owner of the bag (P3) and its contents.

The Accused stated that the facts in the instant case and the facts in case number TSA 73-26/88 are the same. Both cases happened in "satu kejadian". When pressed on what he meant by "satu kejadian" the Accused stated that in the Sessions Court Taiping case he was arrested for possession of 500 rolls of ganja and he did not know how the 400 rolls came to be part and parcel of the records in the Sessions Court Taiping. The Accused further stated that he did not know where the 100 rolls of ganja had gone to.

The Accused stated that the records (exhibit P16) are entirely wrong. But the Accused admitted that he was sentenced by the Sessions Court Taiping and has since served the sentence including being whipped 10 times.

The Accused denied that his defence was a total denial.

Under re-examination, the Accused admitted that the instant case was entirely different from case number TSA 73-26/88 but nevertheless they came under "one transaction". By this he meant that in regard to the 500 rolls of ganja which he possessed, he had been charged and sentenced by the Taiping Sessions Court. In the instant case the Accused admitted ownership of the 50 rolls of ganja which formed part and parcel of the charge against him.

The Accused admitted that in both cases (the instant case and case number TSA 73-26/88) the offences were alleged to have been committed on 20 July 1988. That was why he stated "one transaction". These two cases related to two incidents that happened on the same day. Both represented two separate offences, on one of which, the Accused is currently being tried.

The Accused now stated under re-examination that the facts of the case number TSA 73-26/88 as per P16 were read and explained to him in the Sessions Court Taiping.

The Accused admitted he stayed in Kampong Aman. The Accused stated that in case number TSA 73-26/88 he brought the police to Kampong Aman. And that in the instant case, currently being tried, the Accused brought PW2 and PW3 to Jalan Tupai and the Accused carried the bag (exhibit P3). The distance between Jalan Tupai and Kampong Aman is about 500 yards.

The Accused further admitted under re-examination that Kampong Aman and Jalan Tupai are both in the same locality. And that this locality was formerly called Kampong Aman.

The defence called no other witnesses and the defence Counsel forthwith closed the defence case.

The learned Deputy then made an application to call the Registrar of the Sessions Court Taiping, Perak to tender the original copies of the records of case number TSA 73-26/88. The application was allowed bearing in mind that the Accused brought forward something suddenly and unexpectedly, that is, that he was charged and convicted of being in possession of 500 rolls of cannabis in the Sessions Court Taiping. As rightly observed by Tindal, CJ in *R v. Frost* [1939] 9 C & P 129:

> ... if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the prisoner there seems to me no reason why that matter which so arose *improviso* may not be answered by contrary evidence on the part of the Crown

and after Raja Chulan bin Raja Othman (PW9) gave his formal evidence, the original copies of the records of case number TSA 73-26/88 were marked as exhibit P16A.

Before making his submission at the close of the defence case, the learned defence Counsel made an application to recall the chemist (PW1) under s. 425 of the Criminal Procedure Code for the sole reason of cross examining PW1 in regard to the definition of cannabis under s. 2 of the Dangerous Drugs Act. The learned defence Counsel stated that it was a mistake on his part in not eliciting evidence from PW1 on that point when PW1 was in the witness box. He urged the court to allow PW1 to be recalled as it would be essential to the just decision of the case.

The learned Deputy strenuously objected and argued that the application was made too late in the day. The court had found a *prima facie* case against the Accused, the Accused gave his evidence under oath and had been cross-examined and the defence had closed their case, so submitted the learned Deputy. It was submitted further that if the application was allowed the case would be unduly prolonged.

Section 425 of the Criminal Procedure Code states:

> Any court may at any stage of any inquiry, trial or other proceeding under this code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

It is apparent that s. 425 of the Criminal Procedure Code consists of two parts:

The first part which is discretionary enables a court at any stage

(a) to summon anyone as a witness; or
(b) to examine any person present in court; or
(c) to recall and re-examine any witness.

The second part which is mandatory compels the court to take any of the above steps if the new evidence appears to be essential to the just decision of the case. This is entirely dependent on the facts of each case.

It is undeniable that the Court has the necessary power under the terms of s. 425 of the Criminal Procedure Code to summon and examine any person as a witness (see *Loke Poh Siang v. Public Prosecutor* [1957] MLJ 107, *Public Prosecutor v. Boo Chew Hia* [1963] MLJ 33 and *Public Prosecutor v. Abdul Hamid* [1969] 1 MLJ 53). But the power must be exercised with the utmost care and caution and only when, as set out in the provisions of s. 425, the evidence of that person appears to the Court to be essential to the just decision of the case (see *Public Prosecutor v. Abdul Hamid* [1969] 1 MLJ 53, *Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33 and *Public Prosecutor v. Phon* Nam [1988] 3 MLJ 415). The power vested in the Court is not limited to witnesses whom the Court examines on its own behalf but equally applies to witnesses for the prosecution as well as witnesses for the defence - thus both the defence and the prosecution may be allowed to adduce additional evidence under this section (see *Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33).

Under the terms of s. 425 of the Criminal Procedure Code there is clearly a power to call or recall witnesses even after the close of the case for the defence but in such a situation there should be hesitation to so do without valid strong reasons (see *R v. Bakar bin Sahat* [1951] MLJ 202) or special circumstances warranting it (see *Jacob v. Public Prosecutor* [1949] MLJ 70).

Now, when PW1 gave evidence earlier the learned defence Counsel failed to elicit pertinent answers in regard to the definition of cannabis as set out in s. 2 of the Dangerous Drugs Act 1952. To be precise, according to the learned defence Counsel there was no evidence as to whether resin has not been extracted on the offending exhibits even though the chemist stated that the offending exhibits were cannabis as defined in the Dangerous Drugs Act 1952. It has been established that the paramount consideration for the recall of PW1 would be "the essentiality of the additional evidence to arrive at a just decision of the case". But great care must be adopted in exercising such discretion (see the decisions of the Supreme Court in *Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33 and *Public Prosecutor v. Phon Nam* [1988] 3 MLJ 415).

It must be stressed that a judicial discretion must of course be exercised judicially. The discretion to allow PW1 to be recalled after the defence had closed its case was principally due to:

(1) the subject matter of the charge *viz*, 729.51 grammes of cannabis has been questioned (the essential ingredient to a charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234), and
(2) the case of *Loo Keck Leong v. Public Prosecutor* [1992] 2 MLJ 177 SC.

In *Loo Keck Leong's* case the chemist gave evidence that the exhibits seized from the appellant was found to be cannabis and that: "By cannabis I mean cannabis as defined in the Dangerous Drugs Act 1952". Cannabis is defined in the Act as "any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be

designated". At the trial the chemist agreed that it was possible there might be an insignificant trace of the resin remaining after the resin had been extracted. This would be detected by the test conducted by the chemist. Peh Swee Chin SCJ. held that a fair interpretation of the definition clause relating to cannabis ought to be that the resign should have been sustantially extracted (but not necessarily without a trace in the residue) and not necessarily that the same should have been completely extracted so that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug. Since there was a doubt as to whether the resin had been so substantially extracted, the benefit of that doubt was given to the appellant. Consequently the appeal by the appellant was allowed and he was accordingly acquitted and discharged.

The striking difference between *Loo Keck Leong*'s case and the instant case is this: In the former case the defence challenged the evidence of the chemist right from the start (when the chemist first gave his evidence). Whereas in the latter case, the defence Counsel realised the necessity to challenge the evidence of PW1 only after the defence had closed its case.

Peh Swee Chin SCJ. stated that when the chemist in *Loo Keck Leong*'s case had analysed the plant material and found it to be cannabis "as defined in the Dangerous Drugs Act 1952", the implicit irresistible inference from his evidence would be that the resin had not been extracted from it. And that all the chemist need say, and it would have been that easy for him to have said, that the resin had not been extracted provided he had no doubt about it.

On being recalled by the defence, PW1 gave the following evidence:

Evidence elicited through cross-examination by the defence:

(1) Apart from his BSC (Honours) degree in Chemistry, he pursued a post graduate diploma course in forensic science. He studied for his post graduate course, with special emphasis on the botanical aspects of cannabis plant. He did not have a degree in botany.

(2) He did not quantify the resin content in the plant material but through the miscroscopic examination it was revealed that the plant material has an abundance of resin in its naturally occurring forms.

(3) On being shown one of the offending exhibits (P6B) he said that through visual and miscroscopic examinations he was able to say that there was only one plant material in (P6B) and that was cannabis.

(4) In relation to (P6B), none of the resin has been extracted. Through miscroscopic examination it was revealed that there was no evidence of extraction on (P6B) whether by a physical extraction method or a chemical extraction method.

(5) In relation to (P6B), after applying the extraction methods like threshing, rubbing and boiling in hot water and on application of the chemical solvent extraction method, it was found that the resin has not been extracted.

(6) The gas liquid chromotography (GLC) and the high pressure liquid chromotography (HPLC) tests were not adopted to quantify the resin content in the cannabis. The reason being these tests cannot be used to determine if any extraction of the resin has been performed on the plant material due to the fact that the resin content in cannabis varies widely partly due to the environmental as well as the hereditary factors of the plant in question.

(7) The visual and miscroscopic examinations, the colour test and the thin layer chromotography test enabled him to sufficiently conclude that the plant material was cannabis and that the resin has not been extracted.

Evidence elicited through re-examination by the prosecution

(1) In the visual examination, he found all the plant materials (exhibits P5C, P6B, P7C and P9A) have morphological features characteristic of cannabis. In the microscopic examination he found anatomical features of the plant material characteristic of cannabis. He also found an abundance of resin on the plant materials (exhibits P5C, P6B, P7C, P8C and P9A) in their naturally occurring forms. Through the colour test he obtained positive results confirming the presence of the cannabinoids in the plant materials. In the thin layer chromotography test (TLC) he also obtained positive results for the presence of cannabinoids in the plant materials.

Finally, though all the above tests he was able to conclude that the plant materials (exhibits P5C, P6B, P7C, P8C and P9A) were from the genus cannabis from which resin has not been extracted.

(2) The resin are in abundance in the plant materials (exhibits P5C, P6B, P7C, P8C and P9A), shiny and in globules (in the shape of droplets secreted from the glands of the plant).

(3) Conclusion after having carried out the tests on the plant materials (exhibits P5C, P6B, P7C), P8C and P9A) - that they were from the plant of the genus cannabis from which resin has not been extracted.

(4) Through the above mentioned tests, particularly the visual and microscopic examinations, he found that there was no evidence at all whether by means of physical method or chemical method that the resin has been extracted from the plant materials (exhibits P5C, P6B, P7C, P8C and P9A) and that the resin were still found to be in their natural occurring forms. In short, there was no evidence of extraction and the resin were aplenty, in consonance with the definition of cannabis in s. 2 of the Dangerous Drugs Act 1952.

(5) He did not entertain any doubt at all that the exhibits which he examined (exhibits P5C, P6B, P7C, P8C and P9A), the resin therein had not been extracted.

(6) The resin of the exhibits which he examined (exhibits P5C, P6B, P7C, P8C and P9A) have not been substantially extracted in compliance with s. 2 of the Dangerous Drugs Act 1952.

(7) There were substantial amount of resin in the exhibits which he had examined (exhibits P5C, P6B, P7C, P8C and P9A).

I shall revert to the evidence of PW1 shortly thereafter.

As in every criminal case, the evidence of the Accused has to be considered together with the rest of the evidence and if from his evidence the existence of a material fact on which the prosecution is relying, is no longer probable as to make a prudent man act upon the supposition that that fact exists, the Accused is entitled to an acquittal. I have also re-assessed and re-evaluated the evidence of the prosecution to see whether there was any gap or defect in the evidence. The result of the re-assessment and re-evaluation is that I can find no gap or defect in the evidence. Discrepancies and inconsistencies there might be but they are not sufficient to reject the whole of the evidence of PW2, PW3 and PW8 (see *Khoon Chye Hin v. PP* [1961] 1 MLJ 105).

I now come to the evaluation of the evidence.

There are impediments to the defence story.

Firstly, in the face of the evidence of PW2 and PW3 who acted as undercover agents with the concurrence of PW8, the defence of denial of holding and carrying the bag (P3) with its incriminating exhibits (P5C, P6B, P7C, P8C) cannot by any stretch of imagination be said to carry any weight.

Both PW2 and PW3 are not accomplices since they have announced themselves to be agents for the prosecution before the actual commission of the offence (see *Sathasivam & Ors. v. PP* [1949] MLJ 71). It cannot be doubted that they are agents provocateur. And generally, the Court is always wary of the evidence of an agent provocateur. But in this case, by virtue of s. 40A of the Dangerous Drugs Act 1952, the evidence of an agent provocateur needs no corroboration to found a finding by the trial Court (see *Public Prosecutor v. Mohamed Halipah* [1982] 1 MLJ 155, *PP v. Tahir bin Kassin* [1985] 1 MLJ 381, *Namasiyiam & Ors. v. PP* [1987] 2 MLJ 336 SC and *PP v. Tan Gong Wai and Anor.* [1985] 1 MLJ 355).

Secondly, the movements of PW2 and PW3 were monitored by PW8. Each activity undertaken or about to be undertaken by PW2 and PW3 was reported to PW8. The Accused denied carrying the bag and its incriminating contents and alleged that he was framed by PW2 and PW3. The amount of cannabis involved is huge, 729.51 grammes whereas a minimal amount of 200 grammes or more in weight of cannabis would be sufficient to trigger the presumption under s. 37(da)(vi) of the Dangerous Drugs Act 1952. I have no reason to doubt the evidence of PW2 and PW3 that it was the Accused that carried the bag (P3) with its incriminating contents. Both PW2 and PW3 gave absolutely honest and frank evidence, I have no reason whatsoever to disbelieve them when they said that the Accused carried the bag (exhibit P3) and its contents. In the result, it is impossible for this Court to accept the suggestion of the Accused that in regard to the incriminating exhibits, he had been dealt with before, that is, in the Sessions Court.

If PW2 and PW3 wanted to put the Accused in trouble surely they would not resort to low lying tactics. There was no evidence of any grudges between them. Both PW2 and PW3 played their respective roles admirably; they became casual friends (to borrow the words of the Accused) of the Accused. Moreover, it must be borne in mind that both PW2 and PW3 had to locate the Accused, a known target in that area, on the instructions of PW8.

Thirdly, the allegations of assault and coercion to admit ownership of the incriminating exhibits by the police personnel on the Accused were never brought up by the defence when PW2, P3, PW8 and other police personnel gave evidence. In short none of the prosecution witnesses was cross-examined in regard to these matters. Thus, it can simply be brushed aside as an afterthought on the part of the Accused. (see *PP v. Teo Boon Qeer & Anor.* [1984] 1 CLJ 123, *R v. Vilayutham* [1935] MLJ 277), *Chua Beow Huat v. PP* [1970] 2 MLJ 29, *R v. Pichimuthu* [1970] 2 MLJ 143 and *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212).

Fourthly, the allegation that the Accused was already dealt with by the Sessions Court Taiping and sentenced to 6 years imprisonment and 10 strokes of the rattan in regard to the 500 rolls of ganja and that he has since served the sentence and has received the 10 strokes of rattan.

Now, the Sessions Court Taiping case was a case under s. 39A(2)(f) of the Dangerous Drugs Act 1952 vide case number TSA 73-26/88. There, 400 rolls of ganja was involved wherein the Accused brought Inspector Fadzil to a spot at Ulu Tupai area and showed to the said Inspector where he had buried the ganja. (see exhibits P16 and P16A). The Accused had pleaded guilty, admitted to the facts and also admitted to the exhibits in case number TSA 73-26/88. The Accused was convicted and sentenced to 6 years imprisonment w.e.f. date of arrest and was ordered to receive 10 strokes of rattan. The Accused has since served the sentence in full. Therefore, it cannot now be said, as is alleged by the Accused, that he never agreed with the facts in case number TSA 73-26/88. The records in exhibits P16 and P16A speak loudly against the Accused.

Fifthly, the denial by the Accused that the ganja (cannabis) in the present case belonged to him. And that the Accused stated that he did not know how the ganja (cannabis) came to be at Ulu Tupai. In the face of the overwhelming evidence of PW2 and PW3 the mere denial by the Accused would be, in my view, calculated to pervert the course of justice (see *PP v. Ku Lip* See [1981] 1 MLJ 258, *D.A. Duncan v. PP* [1980] 2 MLJ 195 FC, *PP v. Ling Tee Huah* [1982] 2 MLJ 324, *PP v. Akin Khan bin Abdul Rahman* [1987] 2 CLJ 244).

Sixthly, the reaction of the Accused upon being arrested by PW2 and PW3, *viz*, "appeared shocked and panicky when he heard the word police" "reacted in disbelief that they were police personnel and he was in total shock" "felt giddy, shocked and still dazed". It can safely he inferred since the Accused was caught red handed carrying the bag with its incriminating contents that the reaction of the Accused should rightly be used to infer a guilty knowledge on his part (see *Kevin John Barlow and Brian Geoffrey Chambers v. PP* [1987] 2 CLJ 286 SC.

Seventhly, the demeanour of the Accused when he gave evidence was to say the least, at its lowest ebb. There were pauses, cynical smiles, confusion all added into one. The credibility of the Accused was at stake. It must be stressed that the court complied with the provisions of s. 271 of the Criminal Procedure Code (see *PP v. Ku Lip See* [1981] 1 MLJ 258.

With respect the evidence of the Accused is bristled with lies and half truths. His untruthfulness is a factor which I can properly and should rightly take into account as strengthening the inference of guilt (see *Broadhurst v. The Queen* [1964] AC 445.

The Accused put up a defence primarily in an attempt to escape the effect of the presumption in s. 37(da)(vi) of the Dangerous Drugs Act 1952 that he was trafficking in cannabis. He admitted possession of the 50 rolls of cannabis which came to 21.39 grammes and disclaimed knowledge of the 4 plastic packages containing 708.12 grammes of cannabis. But his defence is hollow and flies in the face of the clear and unshaken evidence of PW2 and PW3 that the 4 plastic packages were physically held by him (carried the bag (exhibit P3) with its incriminating exhibits). In regard to the 4 plastic packages his defence was plainly one of denial.

In the result, I am fully satisfied that the Accused has failed to rebut the presumptions

under ss. 37(d) and 37(da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities. As the quantities of the dangerous drugs, namely the 729.51 grammes of cannabis are more than the amount stipulated in s. 37(da)(vi) of the Dangerous Drugs Act 1952, I am satisfied that he did traffic in and on his own behalf the 729.51 grammes of cannabis on the date and at the time and place mentioned in the charge.

In regard to the evidence of PW1, it is undeniable that as an expert witness, the Court is entitled as of right to accept it on its face value unless such evidence is inherently incredible or the defence calls evidence in rebuttal by way of another expert to contradict or vary the evidence of PW1. The defence did not call another expert to challenge the evidence of PW1. The defence merely cross-examined at length PW1, which in turn further strengthened the prosecution's case (see *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC, *Public Prosecutor v. Lam San* [1991] 3 MLJ 426 SC).

Now when PW1 was recalled by the defence he gave evidence strictly on the definition of cannabis in s. 2 of the Dangerous Drugs Act 1952. PW1's evidence squarely laid to rest any doubt and established once and for all beyond reasonable doubt that the resin has not been extracted.

Having seen and heard the Accused and considered his defence as a whole (in its entirety), I did not believe him. In view of PW2, PW3 and PW8's earlier testimony, I held that the Accused's version was merely a denial, which in the circumstances failed to rebut the presumptions under s. 37(d) and s. 37(da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities. Therefore the prosecution had proved its case beyond reasonable doubt and I found the Accused guilty of the offence for which he was charged and convicted him. Accordingly I sentenced him to death.

The accused appeals.

Order accordingly.

PUBLIC PROSECUTOR

v.

PARAMESWARAN A/L K. MUNIANDY & ANOR.

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[PERAK CRIMINAL APPEAL NO. 51-93-92 (89)]
18 NOVEMBER 1992

APPEAL: Power to reverse decision of lower Court on appeal - Public Prosecutor's appeal against acquittal - Third Accused absent during appeal as notice could not be served - Effect of s. 314 CPC when Third Accused does not appear during appeal - Finding of fact - Decision against weight of evidence - Whether appellate Court has jurisdiction to reverse order of acquittal based on finding of facts by lower Court.

DANGEROUS DRUGS: Possession - Offence of possession of heroin in dwelling house - Section 12(2) Dangerous Drugs Act 1952 - Whether both respondents were occupiers of house raided by police - Legal presumption of possession once custody and control is established - Section 37(d) - Legal presumption drug is concealed with knowledge of occupier of premises once drug is found concealed in any premises - Section 37(g) - Both presumptions are rebuttable on balance of probabilities - Whether there must be sufficient exclusivity of possession to make a person an occupier - Definition of 'occupier' - Acquittal by Magistrate after hearing defence evidence.

This was an appeal by the learned DPP against the acquittal of both the respondents by the learned Magistrate upon hearing the defence evidence.

Held:

[1] An appellate Court has jurisdiction to reverse an order of acquittal based on the finding of facts by the trial Judge though it shall be slow to disturb the finding of facts arrived at by a Judge who had the advantage of seeing the witnesses.

[2] However, the appellate Court shall scrutinize the whole evidence in its totality and shall be satisfied whether the order of acquittal was against the weight of the evidence as a whole. Applying these principles, the Court proceeded to hear the appeal.